Supreme Court, U.S.
FILED
04 433 SEP 29 2004
OFFICE OF THE CLERK

No. 04-

In the Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND,
NATIONAL STEEL SUPPLY, INC.,
Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

HARRY FIRST
40 WASHINGTON SQUARE SOUTH
NEW YORK, NY 10012
(212) 998-6211

Of Counsel

RICHARD L. HUFFMAN
Counsel of Record
WILLIAM M. BRODSKY
FOX HORAN & CAMERINI LLP
825 THIRD AVENUE
11TH FLOOR
NEW YORK, NY 10022
(212) 480-4800

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

Question Presented

Whether a competitor is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO") where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.

Statement Pursuant to Supreme Court Rule 29.6

Petitioner National Steel Supply, Inc. is a privately owned entity. It has no parent corporation and there is no publicly held company that owns 10% or more of their stock.

TABLE OF CONTENTS

Question Presented i

Statement Pursuant to S. Ct. Rule 29.6 ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

A. Summary of Allegations in the Amended Complaint 2

B. The Decisions Below 4

Reasons for Granting the Petition 4

I. The Circuits are Split 5

II. The Court Should Limit Competitor Standing in RICO Mail Fraud Cases 9

Conclusion 14

Appendix

Appendix A - Second Circuit Opinion - 07/02/04 . . 1a

Appendix B - District Court Decision and Order - 04/02/03 . . . . . 27a

Appendix C - Statutory Provisions Involved - 18 U.S.C. §§ 1961-1968 . . . . . 38a

TABLE OF AUTHORITIES

Cases

California Dental Association v. Federal Trade Commission, 526 U.S. 756 (1999) 10

Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 7

Gregory v. United States, 253 F.2d 104 (5th Cir. 1958) 9

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 5, 8, 9, 13

Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996) 8, 9, 10

Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994) 7, 8, 12

Newton v. Tyson Foods, Inc., 207 F.3d 444 (8th Cir. 2000) 9

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) 10, 12

Poulos v. Caesars World, Inc., 379 F.3d 654 (9th Cir. 2004) 6

Sikes v. Teleline, 281 F.3d 1350 (11th Cir. 2002) . . 6

Systems Management, Inc. v. Loiselle, 303 F. 3d 100 (1st Cir. 2002) 6

Vandenbroeck v. CommonPoint Mortgage Co., 210 F.3d 696 (6th Cir. 2000) 6

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S.Ct. 872 (2004) 11, 12

Statutes and Rules

18 U.S.C. § 1341 . . . . . 3, 9
18 U.S.C. § 1343 3
18 U.S.C. §§ 1961-1968 (RICO) . . . . . *passim*
18 U.S.C. § 1962(a) 3, 4
18 U.S.C. § 1962(c) 4
18 U.S.C. 1964(c) 5, 9
28 U.S.C. § 1254 1
28 U.S.C. § 2101 1
28 U.S.C. § 1331 1
Fed. R. Civ. P. 12(b)(6) 2
S. Ct. Rule 13.1 1

Opinions Below

The ruling of the United States Court of Appeals for the Second Circuit dated July 2, 2004 reversing the decision of the District Court is officially reported at 373 F. 3d 251 and is reproduced at App. A at 1a.

The decision and order of the United States District Court for the Southern District of New York dismissing the plaintiff's complaint dated April 1, 2003 is reported at 254 F.Supp. 2d 464, and is reproduced at App. B at 27a.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on July 2, 2004. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provisions are the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, set out at App. C at 38a.

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction). The plaintiff's two federal claims are based upon allegations that the defendants violated the Racketeer Influenced and Corrupt

Organizations Act, 18 U.S.C. §§ 1962-1968 ("RICO"). The complaint having been dismissed by the district court on plaintiff's Rule 12 (b)(6) motion, the Record consists only of the plaintiff's amended complaint.

A. Summary of Allegations in the Amended Complaint

Plaintiff Ideal Steel Supply Corp. ("Ideal") and defendant National Steel Supply, Inc. ("National") are competitors. They sell "steel mill products (such as steel bars and sheets) and related hardware, supplies and services, to ornamental iron workers and small steel fabricators," as well as to "do-it-yourself homeowners." (Plaintiff's Amended Complaint, ¶ 16). They are the "principal competitors in New York City for the types of products they each sell" (*id.*, ¶ 15). The "overall demand" for their products "is dependent primarily upon economic activity in the real estate and construction businesses" and the general demand for "ornamental security or other ironworks" (*id.*, ¶ 22).

Sales made for resale, and sales made to tax-exempt entities (such as schools, churches, or other not-for-profit purchasers), are not subject to New York State sales tax; sales made to other purchasers are. *See id.*, ¶ 18. Ideal alleged that National did not collect sales tax on sales to those of its customers who were "cash-paying [and] non-exempt" (*id.*, ¶ 4) and that National's alleged failure to report such sales to the New York State Department of Taxation and Finance constituted "fraudulent misrepresentations" to that agency (*see id.*, ¶ 5). Plaintiff alleged that the New York State Department of Taxation and Finance "has relied and continues to rely" on the alleged fraudulent misrepresentations in defendant's sales tax returns (*see id.*, ¶ 30).

Ideal further alleged that National's failure to collect sales tax from these customers created "an improper competitive advantage for National over Ideal" (*id.*, ¶ 32). More specifically, Ideal alleged that after National opened a new facility in the Bronx in 2000--"just eight minutes by automobile from Ideal's Bronx location" (*id.*, ¶ 20)--Ideal experienced "a steep drop in taxable cash sales . . . disproportionate to the effect that National's new Bronx location had on Ideal's overall sales" (*id.*, ¶ 35).

Ideal alleged that "each occasion" of National's false filing of its New York State sales tax returns ("at least since 1998 if not before") violated the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and that each violation was a predicate act of racketeering under the Racketeer Influenced and Corrupt Organizations Act. *See* Plaintiff's Amended Complaint, ¶¶ 45-47. Ideal further alleged that National's alleged scheme "directly injures Ideal because defendants' conduct is aimed at increasing National's market share and overall profits at the expense of its principal competitor, Ideal." (*Id.*, ¶ 49.) Ideal thus sought damages for lost profits arising from the "substantial volume of its taxable cash business" which it lost to National (*see id.*, ¶¶ 50, 51).

Ideal also alleged that National had invested the "racketeering income" gained from its alleged tax avoidance when opening its new facility in the Bronx and that this gave rise to a separate violation of RICO (under § 1962(a)). As a result of this investment, Ideal alleged, it had "lost significant business and market share" (*id.*, ¶ 57). Ideal accordingly sought additional damages for this loss.

B. The Decisions Below

District Court Judge Richard Berman dismissed the complaint, holding that Ideal had failed to plead that National's actions were both the proximate cause of Ideal's damages and that Ideal itself relied upon National's misrepresentations. The court reasoned that when a RICO claim is based upon the alleged racketeering activity of mail or wire fraud, the RICO plaintiff must be able to show it relied upon the fraudulent misrepresentations. 245 F. Supp. 464, at 468-69.

The Court of Appeals reversed, remanding the case for further proceedings. Judge Kearse, thoroughly reviewing Second Circuit precedent as well as precedent from the Fourth Circuit, wrote that it was appropriate to grant standing to a "competitor alleging injury to its business resulting from racketeering activity," 373 F.3d 251, at 260, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Id*. at 263. It was enough that Ideal was "a competitor directly targeted by defendants for competitive injury." *Id*. at 264. Accordingly, the Court of Appeals held that Ideal's complaint adequately stated a claim under § 1962 (c) for conducting an enterprise through a pattern of racketeering activity, and under § 1962 (a) for investing racketeering income in the opening of its new store in the Bronx.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law on which the Circuits are split. The Second Circuit's willingness to expand standing under RICO to protect competitors when it was another party who was defrauded threatens to create a federal law of unfair competition, in which treble damages

might be available for conduct that this Court would have viewed as procompetitive in the context of antitrust litigation. The result may be to undermine this Court's carefully crafted jurisprudence in the antitrust area, a result not likely intended by Congress when it placed the antitrust treble-damages remedy in the RICO statute.

I. THE CIRCUITS ARE SPLIT

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court established the basic approach for determining when a party is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as required by Section 1964(c) of the Act. Drawing on decisions from the treble-damages provision of the antitrust laws, on which the RICO provision was modeled, *Holmes* held that plaintiffs are required to prove not just "but for" causation, but also "proximate" cause. *See id*. at 265-68. The Court used "proximate cause" to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id*. at 268. Although the decision in *Holmes* did not adopt any particular bright-line statement of what that limit might be, the decision did stress the importance of "some direct relation between the injury asserted and the injurious conduct alleged," adding that a plaintiff complaining of harm "from the misfortunes visited upon a third person by the defendant's acts" is generally thought "to stand at too remote a distance to recover." *Id*. at 268-69.

The Second Circuit's decision in the instant case reads *Holmes* expansively, allowing a competitor to sue under RICO even though it is not the defrauded party and even though the alleged fraudulent conduct was "directed to and

relied on by a third party rather than the plaintiff." 373 F.3d at 263. On this point there is a clear split in the Circuits.

On a formal level, this split has been expressed in the question whether "reliance" by the plaintiff is necessary, with the Circuit Courts for the Sixth and Eleventh Circuits requiring reliance and the First Circuit clearly rejecting the requirement (as did the Second Circuit in the instant case). *Compare, e.g., Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (for a cognizable claim for fraud under RICO, plaintiffs must show a material misrepresentation and "that plaintiffs in fact relied upon that material misrepresentation") and *Sikes v. Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002) (to prove injury "in a civil RICO case predicated upon mail or wire fraud," plaintiff must prove that he was "'a target of the scheme to defraud' and that he 'relied to his detriment on misrepresentations made in furtherance of that scheme.'") (supporting citations omitted), *cert. denied*, 537 U.S. 884 (2002), *with Systems Management, Inc. v. Loiselle*, 303 F. 3d 100, 103, 104 n.3 (1st Cir. 2002) (although noting that some courts have required proof that the plaintiff "relied upon the deception," court holds that plaintiff workers, who did not receive the fraudulent communications, need not show reliance because "a reasonably predictable consequence" of the fraud was to enable the defendant "to continue to underpay his workers") (dismissing suit on other grounds); *cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004) (although declining to reach question whether reliance is required in a civil RICO claim based on mail fraud, court recognizes that "[o]ur sister circuits have split on this issue") (citing examples of the split).

The heart of the disagreement in the Circuits, however, is over the question whether RICO will be read expansively to

permit the recovery of damages by competitors who believe themselves disadvantaged by an alleged fraud. On this the Fourth Circuit agrees with the Second, and allows such suits, but the Sixth and Seventh do not.

In *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994), relied on by the Second Circuit in the instant case, the Fourth Circuit permitted a reseller of long-distance telecommunications service to sue its competitor under RICO on the grounds that the competitor had defrauded the competitor's customers by tricking them into thinking they were getting a better deal than they were, and that this fraud made it more difficult for the plaintiff to compete. Even though it was the defendant's customers who were the "direct victims" of the defendant's schemes, the court gave the plaintiff the opportunity to show that "the artificially low billings were purposefully devised" to hurt the plaintiff's business, thereby allowing the plaintiff to collect the "lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones." *Id.* at 263-64.

By contrast, in *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994), the Sixth Circuit did not allow a beer distributor to sue its supplier and a competing distributor under RICO for fraudulently supplying beer to the competitor, in violation of Michigan law, thereby "usurping sales" that the plaintiff would otherwise have made. *Id.* at 182. Under RICO, the court held, the fraud "must involve misrepresentations or omissions flowing from the defendant to the plaintiff." *Id.* at 184. "Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central

Distributors relied on any statement or omission to its detriment." *Id.* at 184.

More to the point is the Seventh Circuit's decision in *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996), a suit brought by a travel agency against its competitor, under both the Sherman Act and under RICO, for allegedly fraudulent statements made to customers in the course of promoting tours to Israel. After agreeing with the district court that the antitrust claim was without merit, the court of appeals considered the "more substantial RICO claim." The district court had dismissed the RICO claim on the ground that the plaintiff's injury was indirect, because the fraud involved consumers rather than the plaintiff-competitor. *See id.* at 1257. Judge Easterbrook, writing for the court of appeals, reviewed the decision of the Fourth Circuit in *Mid Atlantic Telecom* that RICO "allows suits when the predicate offenses influence customers and, derivatively, injure business rivals." Asserting that "[a] conflict among the circuits on such a question would be regrettable," the court decided to "accept *Mid Atlantic*." *Id.* at 1257.

Nevertheless, "like a troll under the bridge," to use Judge Easterbrook's colorful simile, *see id.* at 1257, there was another theory available for why the plaintiff-competitor lacked standing to bring its RICO claim. Drawing on Justice Scalia's "zone of interests" approach to standing articulated in *Holmes*, *see id.* at 1258, the court held that a plaintiff "must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* The plaintiff, as a vendor to the persons deceived, was not "among the persons protected" by the Mail Fraud statute. The "essential point," Judge Easterbrook wrote, "is that the victims of the fraud are the object of solicitude;

§ 1341 [the Mail Fraud statute] does not establish a regimen of truth-telling without regard to details like who is losing out and why." *Id. Cf. Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (zone of interests test suggests that only consumers have standing to sue chicken producer for alleged fraud in connection with government poultry inspections) (dismissing RICO suit by plaintiff beef producers for lack of standing). In taking this approach to standing, the Seventh Circuit clearly placed competitors who are not the victims of the fraud and who are, therefore, only injured "derivatively," outside the coverage of Section 1964(c) of the RICO statute. "[F]irms suffering derivative injury from business torts therefore must continue to rely on the common law . . . ." *Id.* at 1258.

The Second Circuit in the instant case has taken an approach to standing that differs from the approach taken by Judge Easterbrook and the Seventh Circuit in *Israel Travel Advisory Service*, and differs as well from the Sixth and Eleventh Circuits with regard to the need for reliance. Given the conflicting views on this question of standing for competitors who are not the direct victims of a fraud, and who have not relied on any fraudulent statements, it is critical that this Court provide further guidance to the federal courts on the limits that RICO places on "a person's responsibility for the consequences of that person's own acts." *Holmes*, *supra*.

II. THE COURT SHOULD LIMIT COMPETITOR STANDING IN RICO MAIL FRAUD CASES

The concept of fraud under the federal Mail Fraud statute has proven to be extremely elastic. *See, e.g., Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (scheme to defraud is judged by a standard that is a reflection of "moral

uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society"). As this Court has recognized as well, falsehoods can have anticompetitive effect. *Cf. California Dental Association v. Federal Trade Commission*, 526 U.S. 756, 773 n.9 (1999). If these falsehoods are litigated under the antitrust laws, the courts will give them careful attention to be certain that they are truly anticompetitive. *See Israel Travel Advisory Service, supra*, 61 F.3d at 1256 ("It is an abuse of the antitrust laws to invoke them to stifle nascent competition."). Providing treble-damages under RICO for Mail Fraud violations that might harm competitors, however, is a great incentive for those competitors to bring their complaints under RICO and thereby avoid the careful antitrust analysis that this Court has given to such complaints in recent years. This helps explain why Judge Easterbrook was so careful to cabin competitor standing in *Israel Travel Advisory Service*.

Two recent cases in which this Court has carefully limited antitrust recovery suggest the danger posed by the approach adopted by the Second Circuit in the instant case. One is *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), involving a suit by a competitor for conduct which defrauded New York state regulators. Discon sued NYNEX for engaging in a boycott of its premises equipment removal services. The Second Circuit had held that boycott to be per se unlawful, but this Court reversed, holding that the boycott should be assessed under a rule of reason. The Court wrote (525 U.S. at 136-37):

> To apply the per se rule here--where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud--would transform cases involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases. And that per se rule would discourage firms from changing suppliers--even where the competitive process itself does not suffer harm. . . .

The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. *Cf. Standard Oil*, 221 U.S., at 62, 31 S.Ct. 502 (noting "the freedom of the individual right to contract when not unduly or improperly exercised [is] the most efficient means for the prevention of monopoly"). At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." . . .

The other case is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872 (2004). In *Trinko* this Court upheld the dismissal of a suit by a consumer of telecommunications services who alleged that Verizon had violated Section 2 of the Sherman Act by breaching its duty under the Telecommunications Act of 1996 to share its facilities with its competitors. Verizon's conduct had been examined by the FCC and the New York Public Service Commission, both of which had imposed financial penalties for noncompliance and had required remediation measures. *See* 124 S.Ct. at 873. In finding no violation of the antitrust laws this Court noted that antitrust analysis "'must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies,'" *id.* at 881, and that "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Id.* at 879 (emphasis in original).

The care with which this Court approached the allegedly anticompetitive behavior in *Discon* and *Trinko* would not be duplicated were the litigation brought as a RICO/Mail Fraud case. The regulatory fraud in *Discon* is readily translatable into a fraud complaint, but it would then not be weighed under a rule of reason approach. The only question would be the financial impact on the competitor, not the impact on competition as tested under a rule of reason. Similarly, it would be easy for a competitor of Verizon to allege misrepresentations in Verizon's statements to regulators and seek treble damages for lost revenue, as the plaintiff sought in *Mid Atlantic*, *supra*. *See* Brief for Covad Communications Company, Inc. as Amicus Curiae in Support of Respondent, *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (No. 02-682), 2003 WL 21755938 (competitor of Verizon alleging misrepresentations by Verizon to state commissions regarding availability of space in central offices for collocating facilities). Whether such conduct was anticompetitive and the impact of such liability on incentives to invest in new facilities, however, would go unexplored in a RICO suit.

The danger posed by a broad standing rule is confirmed by the Second Circuit's decision in the instant case. One of the arguments made by the defendant's competitor is that the advantage the defendant received through the alleged fraud generated profits which, in turn, were used by the defendant to open a store close to the plaintiff and to compete more effectively. The investment of the "racketeering income," plaintiff alleged, caused it to "'los[e] significant business and market share' (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58)." 373 F.3d at 255. The Second Circuit upheld this part of the plaintiff's claim, *see id.*, at 264, but whether this "loss of market share" caused by the investment in the defendant's new store is pro- or

anticompetitive will not be tested in the RICO litigation. The focus will be on the proof of fraud, the investment of the income, and the consequent monetary injury.

The Second Circuit's extension of RICO standing to non-defrauded competitors threatens to turn RICO into a federal law of unfair competition, complete with treble damages and attorneys fees. It seems doubtful that the "background practice against which Congress legislates," *Holmes*, *supra*, 503 U.S. at 287 (Scalia, J., concurring), would lead to such an interpretation of the RICO private damages provision. Indeed, it would be ironic for RICO's private treble-damages provision, modeled as it was on the antitrust laws, to be interpreted in a way that end-runs those very laws. Review and reversal of the Second Circuit's approach to standing under RICO will thus advance the legislative purpose of both the RICO statute and the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Richard L. Huffman
Counsel of Record
William M. Brodsky
Fox Horan & Camerini LLP
825 Third Avenue, 11th Floor
New York, NY 10022
(212) 480-4800

Of Counsel:

Harry First
40 Washington Square South
New York, NY 10012
(212) 998-6211

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 03-7381

[Filed July 2, 2004]

IDEAL STEEL SUPPLY CORP.,
Plaintiff-Appellant,

v.

JOSEPH ANZA, VINCENT ANZA,
and NATIONAL STEEL SUPPLY, INC.,
Defendants-Appellees.

Appeal from a judgment of the
United States District Court
for the Southern District of New York
Richard M. Berman, Judge

Before: WALKER, Chief Judge, and KEARSE and CABRANES, Circuit Judges.

OPINION

KEARSE, Circuit Judge:

Plaintiff Ideal Steel Supply Corp. ("Ideal") appeals from a judgment of the United States District Court for the Southern District of New York, Richard M. Berman, Judge, dismissing its amended complaint, brought principally under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"), alleging that Ideal's business had been injured by reason of the practice of defendants National Steel Supply, Inc. ("National"), et al., of failing to charge certain customers sales taxes as required by New York State ("State") law and thereafter sending the State Department of Taxation and Finance ("State Tax Department") fraudulent sales tax reports by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. Ideal also asserted a state-law claim for breach of contract. The district court dismissed the RICO claims pursuant to Fed. R. Civ. P. 12(b)(6), ruling that the complaint did not state a claim under 18 U.S.C. § 1964(c) because it failed to allege the necessary causation, in that it did not, and could not, assert that the alleged misrepresentations had been relied on by Ideal. The court declined to exercise supplemental jurisdiction over the contract claim and dismissed that claim without prejudice. On appeal, Ideal contends that it adequately pleaded that its lost sales were proximately caused by National's pattern of offering customers lower bottom-line cost by means of the unlawful omission of state sales tax and concealing those omissions by means of mail and wire fraud. For the reasons that follow, we agree.

I. BACKGROUND

We summarize below the allegations of the amended complaint ("complaint"), the truth of which is assumed as is required on review of a Rule 12(b)(6) dismissal. We take those allegations, and the reasonable inferences that can be drawn from them, in the light most favorable to Ideal.

A. The Competitors

Ideal is in the business of purchasing steel mill products from manufacturers outside of New York State and selling those products and related hardware and services to professional ironworkers, small steel fabricators, and do-it-yourself homeowners, for use in the New York, New Jersey, and Connecticut area. It has retail stores in Queens and the Bronx.

National, which is owned by defendants Joseph and Vincent Anza (collectively "the Anzas"), sells substantially the same products as Ideal to essentially the same customer base. National has retail outlets in Queens and the Bronx, located a few minutes' drive from Ideal's stores.

Ideal and National are the only substantial competitors in the Bronx or Queens for sales of the steel products they carry. No businesses in those areas other than Ideal and National carry "the same or a similar comprehensive array of products and services or compete for the same customers." (Complaint ¶ 3.) Given the similarity of their product lines (which comprise "generic commodities," *id.*) and the proximity of their retail outlets to each other in each Borough, Ideal and National compete against one another "primarily on the basis of price" (Complaint ¶ 21); "differences in prices charged by Ideal and National affect customers' decisions to purchase

from one or the other" (Complaint ¶ 22). Price fluctuation, however, does not affect overall demand for the products offered by Ideal and National; rather, overall demand is determined by "economic activity in the real estate and construction businesses" and other considerations beyond the control of National or Ideal. (*Id.*)

B. The Allegedly Fraudulent Scheme

Under State law, Ideal and National are required to charge, collect, and remit to the State a combined state and local sales tax of 8B percent on any sale for which the customer does not qualify for an exemption. (*See* Complaint ¶¶ 23-25.) All sales are presumed by law to be taxable unless, within 90 days of purchase, the purchaser presents to the seller a valid resale or exemption certificate. (Complaint ¶ 23.)

Both Ideal and National conduct much of their business on a cash-and-carry basis. According to the complaint, Ideal complies with the state-law requirements that it charge and pay sales taxes, but National does not. The complaint alleged that, at the direction of the Anzas, National does not charge cash-paying non-exempt customers any sales tax; this allows those customers to save 8B percent on their purchases, thereby incurring a substantially lower bottom-line cost than they would incur by purchasing the same items from Ideal.

In order to maintain its profit margin while drawing customers away from Ideal with these unlawful "cash, no tax" sales, National, having refused to charge and collect the sales tax, simply does not pay the tax due on those sales. To conceal the amounts due, National has, since at least 1998, submitted fraudulent sales tax reports to the State Tax Department, failing to report those sales and misrepresenting

its total taxable sales. (Complaint ¶¶ 29-30.) National has filed the fraudulent reports, which are essential to the success of this scheme, by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343.

Ideal commenced the present action in 2002, alleging that National's "cash, no tax" sales, along with the necessary fraudulent reporting, were intended to and did injure Ideal's business. The complaint alleged that National's repeated fraudulent mailings and/or wire transmissions--on which the State Tax Department relied and continues to rely, enabling National to avoid paying sales tax on a significant portion of its taxable sales--constituted a pattern of racketeering activity that "continues to the present day." (Complaint ¶ 30.) Ideal alleged that its own list prices were, on average, no higher than those of National, and that but for defendants' "cash, no tax" scheme, National would have had no competitively significant price advantage over Ideal. The complaint alleged that as a result of the Anzas' operation of National through the above pattern of racketeering activity, in violation of RICO § 1962(c), Ideal had suffered "lost profits in an amount . . . believed to exceed $ 5,000,000." (Complaint ¶ 51.)

In addition, the complaint alleged that the Anzas and National had violated RICO § 1962(a) by using profits gained from the "cash, no tax" scheme at National's Queens facility to open its outlet in the Bronx. (*See* Complaint ¶ 55.) That investment of racketeering income, along with defendants' implementation of the "'cash, no tax' scheme at that location" as well caused Ideal's Bronx outlet to "los[e] significant business and market share" (Complaint ¶ 57) resulting in damages in excess of $2,000,000 (*see* Complaint ¶ 58).

The complaint also alleged that defendants' "cash, no tax" scheme violated the terms of an agreement that had settled an

earlier lawsuit between the parties. (Complaint ¶ 66.) The complaint requested treble damages on each RICO claim and single damages on the contract claim.

C. The Decision of the District Court

Defendants moved to dismiss the complaint pursuant to, inter alia, Fed. R. Civ. P. 12(b)(6), arguing that Ideal lacked standing to bring its RICO claims because it had not adequately alleged that its injuries were proximately caused by defendants' alleged violations of § 1962. In a Decision and Order reported at 254 F. Supp. 2d 464 (2003), the district court granted the motion, stating in part as follows:

> Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,' meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 1999 U.S. Dist. LEXIS 17625, 97 CIV. 9380, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), aff'd 2 Fed.Appx. 109, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995)
> . . . .

254 F. Supp. 2d at 467-68 (emphasis in original). The court ruled that Ideal had failed to plead transaction causation:

> Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged--indeed can not allege--that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail.

Id. at 468.

The court stated that although some RICO claims, such as those asserted in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), are based on predicate acts that do not involve reliance, a RICO plaintiff must be able to show reliance--its own reliance--when the alleged racketeering activity on which its RICO claim is based is mail fraud or wire fraud. *See id.* at 468-69.

Having concluded that Ideal's RICO claims must be dismissed pursuant to Rule 12(b)(6), the court declined to exercise supplemental jurisdiction over Ideal's contract claim, and it dismissed that claim without prejudice. Judgment was entered accordingly, and this appeal followed.

II. DISCUSSION

On appeal, Ideal contends that, despite the fact that it did not itself rely on National's mail and wire frauds, it has

standing to assert its civil RICO claims because it alleged facts sufficient to show that injury to its business was proximately caused by National's pattern of racketeering activity and investment of racketeering income. Because the complaint alleges that Ideal was a competitor of National and was an entity directly targeted for injury by National's racketeering activity, we agree.

A. Mail and Wire Fraud Racketeering Activity

RICO authorizes a private right of action for treble damages by a "person injured in his business or property by reason of a violation of section 1962 of [Title 18]." 18 U.S.C. § 1964(c). Section 1962 provides, in pertinent part, that

> it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce,

18 U.S.C. § 1962(a), and that

> it shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity,

id. § 1962(c).

RICO defines racketeering activity to include mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341. *See, e.g., United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2d Cir.), *cert. denied*, 493 U.S. 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989); *see also United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996) ("Because the[mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way.").

Generally, two or more related acts of racketeering activity may be considered a "pattern" of racketeering activity. *See* 18 U.S.C. § 1961(5); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir.) (*en banc*), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 700 (1989).

B. Civil RICO Claims and Proximate Causation

The requirement in § 1964(c) that a civil RICO plaintiff show that it was injured in its business or property "by reason of" the defendant's RICO violation means that the plaintiff must plead and prove that the violation not only was the logical, or "but for," cause of the injury but also was its legally cognizable, or proximate, cause. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Baisch v. Gallina*, 346 F.3d 366, 372 (2d Cir. 2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir.), *cert. denied*, 124 S. Ct. 532, 157 L. Ed. 2d 424 (2003); *Commercial Cleaning*

Services, L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374, 380 (2d Cir. 2001) ("*Commercial Cleaning*"); *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 399 (2d Cir. 1994) ("*American Express*").

> "Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom may have been injured by his conduct, but only those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was 'reasonably foreseeable or anticipated as a natural consequence.'"

Lerner v. Fleet Bank, N.A., 318 F.3d at 123 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990)), *cert. denied*, 513 U.S. 1079, 115 S. Ct. 728, 130 L. Ed. 2d 632 (1995)).

> The requirement that a defendant's actions be the proximate cause of a plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. *See Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988). In marking that boundary, the Supreme Court has emphasized that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient."

Commercial Cleaning, 271 F.3d at 380 (quoting *Holmes*, 503 U.S. at 268 (other internal quotation marks omitted)).

1. Operating an Enterprise in Violation of § 1962(c)

Applying these principles to claims that the affairs of a RICO enterprise have been conducted in violation of subsection (c) of § 1962, we have upheld dismissals of a variety of civil RICO complaints where the alleged injury was too remote from the alleged racketeering activity. For example, in *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988), the plaintiffs sought damages from a defendant convicted of insider trading in certain stocks, alleging that the plaintiffs lost money investing in other companies in which the defendant was a also shareholder. Plaintiffs' theory was that the defendant's reputation as a successful investor--gained as a result of his pattern of insider trading--had artificially inflated the prices of the stocks purchased by the plaintiffs. The complaint alleged that the plaintiffs suffered investment losses as the prices of those shares fell following the defendant's conviction for insider trading. *See id.* at 62. We affirmed the Rule 12(b)(6) dismissal because the alleged injuries were too remote from the defendant's unlawful activity.

In *Hecht v. Commerce Clearing House, Inc.*, the plaintiff brought a civil RICO action against his former employer and co-workers, alleging that they had implemented a scheme to defraud customers in violation of the mail fraud and wire fraud statutes. The plaintiff alleged that he had been injured by the fraudulent scheme both because clients whom he had serviced had discovered the frauds and ceased to do business with his employer, thereby costing him commissions he would have otherwise earned, and because he had been fired for

refusing to participate in the frauds. *See* 897 F.2d at 22-24. We upheld the district court's dismissal of the plaintiff's claims, explaining that the plaintiff was "'neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s],'" and that the plaintiff's injuries, as a result, were not "reasonably foreseeable . . . natural consequence[s] of the RICO violations" for purposes of § 1964(c). *Id.* at 24 (quoting *Sperber v. Boesky*, 849 F.2d at 65).

In *Lerner v. Fleet Bank, N.A.*, the plaintiffs, who had invested with an attorney who absconded with their money, brought civil RICO claims against the banks in which their funds had been deposited. The plaintiffs claimed that the banks had engaged in racketeering activity, to wit, mail and wire fraud, by sending back to various payees bounced checks that the banks stamped "refer to maker," rather than "insufficient funds"; telling some payees that their checks had been dishonored because of a computer error or because the check had been written on the wrong account, rather than because the attorney had insufficient funds; and sending statements to the attorney that did not mention the dishonored checks. *See* 318 F.3d at 119. The plaintiffs alleged that the banks also failed to report the attorney's overdrafts and other defaults to state disciplinary authorities, which would have caused the attorney to be disbarred and thereby led the plaintiffs to discontinue their investments with him. We held that the connection between the plaintiffs' injuries and the banks' mailings, which obscured the attorney's criminal behavior, was far too attenuated to meet the requirement of proximate cause and that the complaint thus failed to state a civil RICO claim. *See id.* at 122-24.

In *American Express*, we upheld the Rule 12(b)(6) dismissal of a derivative action complaint by shareholders of

American Express alleging that company officials had committed mail and wire frauds and repeated acts of bribery in an effort to defame one Edmond J. Safra, an American Express competitor. *See* 39 F.3d at 396-98. When the fraudulent acts were discovered, American Express was injured by, *inter alia*, losing business and goodwill and having to pay millions of dollars in legal fees and settlements. We upheld the dismissal of the complaint because the alleged injuries to the company were not proximately caused by the racketeering activities of fraud and bribery but rather were caused by the fact that those activities did not have their intended effect and were discovered by their intended target. The target of the unlawful acts was Safra, not American Express; the "RICO defendants' scheme was 'an illicit scheme to injure a potential major competitor of [American Express].'" *Id.* at 400 (quoting the plaintiffs' brief on appeal).

> The injuries alleged thus were neither the "preconceived purpose" nor the "specifically-intended consequence" of the RICO defendants' acts. Moreover, any losses to American Express were caused only because the scheme itself was exposed and thus failed. Therefore, the harm to American Express was neither the "necessary result" of the scheme nor . . . "foreseeable" . . . .

Id.

We reached a similar result in *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816, 117 S. Ct. 66, 136 L. Ed. 2d 27 (1996), in which the defendant advertising agency had paid nearly $1 million to two individual defendants who informed it, falsely, that Abrahams, then a Jamaican tourism official, could be bribed to grant the agency the Jamaican Tourism Board ("JTB")

advertising business. Although none of the bribery money was ever given to Abrahams, he was indicted along with the scheme's participants. After the charges against him were dropped, Abrahams brought a civil RICO action alleging "injuries to his reputation and to his emotional, financial, political, and social status resulting from widespread public dissemination of false information about his role in the bribery scheme." *Id* at 236. We noted, however, that "Abrahams was neither an intended target of the scheme nor an intended beneficiary of the laws prohibiting it." *Id*. at 238. Nor was he injured by the scheme itself; rather, "Abrahams was injured . . . by the fallout from the scheme's exposure." *Id*. at 239. We thus upheld the dismissal of Abrahams's complaint for failure to state a civil RICO claim on the ground that his injuries were not sustained "by reason of" the agency's racketeering activity within the meaning of § 1964(c).

In *Baisch v. Gallina*, in contrast, we reversed the grant of summary judgment dismissing the civil RICO claims asserted by a plaintiff lender against insurance brokers and an operator of Raycon Construction Co. ("Raycon"), a company that, in order to do business with Nassau County, was required "to provide the County with estimates of the number and type of workers needed for each project, along with the number of hours to be worked and the hourly rate per worker." 346 F.3d at 369. The complaint alleged that "the defendants engaged in a pattern of racketeering activity by causing Raycon to submit to Nassau County fraudulent documents, including inflated estimates and falsified claim vouchers." *Id*. Baisch entered into a factoring agreement with Raycon and lost money when Raycon submitted the fraudulent vouchers--and other vouchers not even submitted to the County--to him, and he advanced funds based on those fraudulent vouchers. The district court ruled that Baisch lacked standing to bring a

civil RICO claim because the party directly injured by the alleged racketeering activity would have been the County. We disagreed with the premise that only one category of victim has standing to bring a civil RICO claim. We noted that the foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id*. at 374 (internal quotation marks omitted), even if he was not the primary target or victim, and that "no precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing," *id*. at 375. We noted that the frauds on Baisch and the County were intertwined, and we held that Baisch had standing to pursue a RICO claim based in part on the false vouchers submitted to the County because "the defendants specifically targeted [him] as their victim allegedly by taking his loans under false pretenses and consciously creating a high risk of defaulting on those loans." *Id*.

In each of the above cases in which we approved the summary dismissal of the complaint, we noted that the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity. *See, e.g., Lerner v. Fleet Bank, N.A.*, 318 F.3d at 124 ("We have repeatedly emphasized that the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d at 24 (plaintiff was "neither the target of the racketeering enterprise nor the competitor[] . . . of the racketeer[s]" (internal quotation marks omitted)); *Sperber v. Boesky*, 849 F.2d at 65 (plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"). The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause within the meaning of § 1964(c) is consistent

with the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). In *Sedima*, a divided Court ruled that a civil RICO plaintiff, who had alleged predicate acts of mail and wire fraud, could recover damages not only for "racketeering injury," but also for injury caused directly by RICO predicate acts. *See id.* at 495-96. Although the Court was divided on that issue, all members were in agreement that the principal persons for whose benefit the RICO private right of action was created included a defendant's "competitors . . . whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market," or who could "plead and prove that they suffered . . . injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity," 473 U.S. at 519-20 (Marshall, J., dissenting); *see* 473 U.S. at 497 n.15 (majority opinion, stating that damages recoverable under RICO "include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery").

In *Commercial Cleaning*, we reversed the Rule 12(b)(6) dismissal of a civil RICO complaint alleging that the plaintiff's competitor had engaged in a pattern of racketeering activity, to wit, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324(a), which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. We noted that the plaintiff was

> not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits

> directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (holding that the value of business opportunities lost due to defendant's RICO violations is compensable); *Mid Atlantic Telecom Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (noting that plaintiff was not seeking to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates, but rather alleged "distinct and independent injuries: lost customers and lost revenues") . . . . We have stated a plaintiff has standing where the plaintiff is the direct target of the RICO violation. *See Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234, 238 (2d Cir. 1996); *American Express*, 39 F.3d at 400 (targets of RICO violations were competitive rivals not shareholders harmed by decrease in stock value upon exposure of scheme); *see also Mid Atlantic Telecom*, 18 F.3d at 263 (plaintiff has standing if it can show that it was a "direct target" of defendant's RICO violations). As discussed above, the theory of Commercial's claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.

Commercial Cleaning, 271 F.3d at 384 (internal quotation marks omitted).

In the present case, the district court viewed our holding in *Commercial Cleaning* as inapposite here because the predicate acts alleged in that case were not frauds. We disagree with the court's conclusion. As revealed in the above quotation, *Commercial Cleaning* itself relied in part on the

reasoning of cases such as *Abraham[illegible]ung & Rubicam Inc.* and *American Express*, in which the alleged predicate racketeering activities included acts of fraud. In particular, we cited with approval *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.) ("*Mid Atlantic*"), *cert. denied*, 513 U.S. 931, 115 S. Ct. 323, 130 L. Ed. 2d 283 (1994), in which the Fourth Circuit held that a competitor had standing to bring a civil RICO claim where the only racketeering activities alleged were mail frauds in communications from the defendants to the plaintiff's customers. In that case, Mid Atlantic Telecom, Inc. ("Mid Atlantic"), and defendant Long Distance Services, Inc. ("LDS"), were resellers of long-distance telecommunications services competing for the same customers. The complaint alleged that the defendants had engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "in practical effect, . . . the quoted [LDS] rates were not [as] low[as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Mid Atlantic*, 18 F.3d at 261. The defendants contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and hence "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263. The Fourth Circuit rejected these contentions and vacated the summary dismissal of the complaint, noting that Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic

alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendants' conduct can proximately cause injury, and that although the customers may have been the most direct victims of the defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264.

> . . . Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers).

Id. at 263.

The *Mid Atlantic* holding that a civil RICO plaintiff might prevail by establishing that his injury was proximately caused by a defendant's mail frauds that were relied on by a third person is consistent with the view that this Court had adopted in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). In *LILCO*, the County of Suffolk had asserted a civil RICO claim alleging that defendants Long Island Lighting Company ("LILCO") and its officers committed mail fraud in the course of State Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Although we upheld the posttrial dismissal of that claim for lack of proof that the rate increases were in fact caused by the alleged frauds, we plainly accepted the principle that a RICO

claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, and citing, *inter alia*, *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989) ("*Shaw*"), we stated that

> in the context of this case, which involves RICO mail fraud claims, this means that it was necessary for Suffolk to demonstrate at trial that LILCO's misrepresentations to the PSC were relied upon by the PSC, . . . and that such misrepresentations caused LILCO's rate increases to be granted.

LILCO, 907 F.2d at 1311 (emphases added). Although we ultimately found the trial evidence insufficient, we plainly adopted the principle stated in *Shaw* that "[a] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived," 726 F. Supp. at 973.

Although cases such as *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988) ("*Evans*"), *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) ("*Corcoran*"), and *Metromedia Co. v. Fugazy*, 983 F.2d 350 (2d Cir. 1992) ("*Metromedia*"), *cert. denied*, 508 U.S. 952, 113 S. Ct. 2445, 124 L. Ed. 2d 662 (1993), have sometimes been cited for the proposition that a civil RICO claim based on mail or wire fraud cannot be established absent proof that the plaintiff itself relied on the misrepresentation, *see, e.g.*, *Corcoran*, 886 F.2d at 21 (discussing a possible need for "convergence of the deceived and the injured"), none of those cases held that the plaintiff's own reliance was required. The *Evans* and

Corcoran cases, which were decided under the then-prevailing *McNally* principle that fraudulent mailings did not violate § 1341 unless the scheme was designed to deprive the victim of money or property, *see McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), superseded by statute, 18 U.S.C. § 1346, discussed the convergence theory but did not turn on reliance at all. They held that the government in *Evans* and the plaintiff New York State Superintendent of Insurance in *Corcoran* could not show that they had been deprived of money or property and hence had not even alleged RICO predicate acts. And in *Metromedia*, we stated that "the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on," 983 F.2d at 368 (emphasis added), without suggesting a limitation as to what entity's reliance would suffice, and we cited *LILCO*, 907 F.2d at 1311, which, as discussed above, plainly indicated that a plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether it was the plaintiff or a third party that was deceived. This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the fraud.

The principle that a plaintiff who is injured as a proximate result of RICO predicate acts of fraud need not prove his own reliance, rather than that of a third party, was also approved in our discussion in *American Express*, in which we ruled that American Express shareholders lacked standing to bring derivative civil RICO claims for losses the company incurred in connection with its mail fraud, wire fraud, and bribery-based efforts to defame Safra. Although Safra himself plainly could not have relied on the frauds, we stated that

> if appellants are correct that [individual defendants] violated RICO by defaming Safra, then Safra, as the

> target and victim of the scheme, could sue [them] under RICO and recover treble damages for injuries to his "business or property." *See* 18 U.S.C. § 1964(c).

American Express, 39 F.3d at 401.

In dismissing Ideal's complaint in the present case on the ground that a civil RICO plaintiff who alleges predicate acts of mail or wire fraud has not adequately pleaded transaction causation unless he has alleged that he himself relied on the fraudulent communications, the district court instead relied principally on our decisions in *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-72 (2d Cir. 1999), and *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995). Although those cases contained such language, that language was used in the context of claims brought by plaintiffs who themselves were parties to the transactions that they claimed had been fraudulently induced. In such cases, i.e., where the plaintiff alleges that he was the person deceived, the transaction causation test is not an independent standing requirement but is merely shorthand for part of the normal causation analysis. *Moore* and *Powers* did not deal with circumstances such as those here, in which a plaintiff claims to have been directly harmed by means of a fraud perpetrated on another person, and their statements that the plaintiff must show his own reliance do not control the proximate cause analysis here.

Rather, the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a

civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

In the present case, Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores through a pattern of racketeering activity. According to the complaint, described in Parts I.A. and B. above, defendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.

Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

2. Investing Racketeering Income in Violation of § 1962(a)

Given the facts alleged in the complaint, we also conclude that Ideal has standing to assert its § 1962(a) claim. A plaintiff may state a civil RICO claim for violation of subsection (a) by alleging that a defendant has received "income derived, directly or indirectly, from a pattern of racketeering activity" and has "use[d] or invest[ed]" any part of that income "directly or indirectly" in an enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a). Under that section, the complaint "must allege injury 'by reason of' defendants' investment of racketeering income in an enterprise," as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise. *See Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990).

Here, part of the proceeds of defendants' alleged "cash, no tax" scheme may properly be viewed as racketeering income, indirectly derived from their pattern of mail and wire frauds, given that those frauds enabled defendants to avoid paying 8B< percent of those proceeds to the State. And the complaint alleges that defendants used profits gained from the operation of their "cash, no tax" scheme at National's Queens location to fund the opening of their retail outlet in the Bronx near Ideal's outlet in that Borough. The complaint adequately stated a claim on which relief can be granted under § 1964(c) for a violation of § 1962(a).

C. Defendants' Alternative Arguments for Affirmance

We also reject defendants' contentions that the dismissal of the complaint may be upheld on either of two alternative grounds. First, they contend that we should affirm because

the problems of proof inherent in Ideal's theory of causation are intractable, as its business losses may have resulted from any of a number of economic factors unrelated to National's alleged practice of failing to charge and pay sales tax. (*See* Defendants' brief on appeal at 20-22.) The evidentiary difficulty hypothesized by defendants, however, is not a proper basis for a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. *See, e.g., Commercial Cleaning*, 271 F.3d at 382-83; *see also Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (potential difficulty in establishing "chain of causation . . . . is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss").

Second, defendants argue that the judgment of the district court should be affirmed because Ideal failed to allege that defendants' electronic filings were interstate, a jurisdictional element of the wire fraud offense described in § 1343. *See generally Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 243 (2d Cir. 1999) (a § 1343 offense "requires that the defendant communicate by wire in 'interstate or foreign commerce'"; a "purely intrastate communication [is] beyond the statute's reach" (other internal quotation marks omitted)). Defendants argue that because National is located in New York and the allegedly false tax reports were filed within the State, National's electronic tax filings cannot have violated the wire fraud statute. This contention is both substantively and procedurally flawed. As a matter of substance, it is possible for a wire communication whose origin and ultimate destination are within a single state to be routed through another state. *See, e.g., United States v. Davila*, 592 F.2d 1261, 1263 (5th Cir.) (upholding § 1343 wire fraud conviction of a defendant who used Western Union wire transfers to send money between San Antonio and McAllen, Texas, which were routed through Middletown,

Virginia), *reh'g denied*, 597 F.2d 283, *cert. denied*, 444 U.S. 843, 100 S. Ct. 85, 62 L. Ed. 2d 56 (1979); *see also United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) (defendant need not know that its wire communication travels through interstate commerce for § 1343 to be applicable), cert. denied, 402 U.S. 945 91 S. Ct. 1629, 29 L. Ed. 2d 114 (1971). As a matter of procedure, the question of whether Ideal will be able to prove that pertinent wire communications by defendants traveled interstate is a matter for trial, not for resolution on a motion pursuant to Rule 12(b)(6). Further, even if it were clear that defendants' wire transmissions were purely intrastate, that would not warrant dismissal of the complaint, for the complaint alleges not only wire fraud but mail fraud. There is no requirement that mail travel interstate for its sender to violate § 1341. *See, e.g., United States v. Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002).

CONCLUSION

We have considered all of defendant's arguments in support of affirmance and have found them to be without merit. The judgment dismissing the RICO claims is vacated for the reasons stated above. We also vacate the dismissal of the state-law contract claim, over which the district court declined to exercise supplemental jurisdiction because of its dismissal of the RICO claims. The matter is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 4788 (RMB)

[Filed April 2, 2003]

IDEAL STEEL SUPPLY CORP.,
Plaintiff,

v.

JOSEPH ANZA, VINCENT ANZA and
NATIONAL STEEL SUPPLY, INC.,
Defendants.

RICHARD M. BERMAN, U.S.D.J.

DECISION AND ORDER

I. Background

In this action, filed in June 2002, Ideal Steel Supply Corp. ("Plaintiff" or "Ideal") alleges that National Steel Supply, Inc. ("National") and its owners, Joseph and Vincent Anza (collectively, "Defendants"), engaged in a "racketeering" scheme in violation of 18 U.S.C. §§ 1962(a) and (c)("RICO"). Ideal's amended complaint also includes a state

law breach of contract claim. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) and 9(b).

The Court treats the following allegations in the amended complaint ("AC") as true for the purposes of this motion. *See Piccone v. Bd. of Directors of Doctors Hosp.*, 97 Civ. 8182, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *1 (S.D.N.Y. Aug. 28, 2000).

Ideal and National distribute and sell steel mill products and related hardware, supplies, and services, including steel bars and sheets, in a "lumber yard" setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. (ACPP2, 16.) Ideal and National each have two store locations, one in the Bronx and one in Jamaica, Queens. (ACPP3, 19-20.) Each one of Ideal's stores is located within a few minutes of each of National's stores. (ACPP19-20.)

National is Ideal's principal competitor in New York City for the products it sells. (ACP15.) No other business in the Bronx or Queens sells "the same or a similar comprehensive array of products and services or competes for the same customers." (ACPP3, 16, 19-20.) "As Ideal and National sell at nearby locations similar product lines of generic commodities, they compete principally on the basis of price." (ACPP3, 21.) Demand in the market does not fluctuate based on price, but on the robustness of the construction industry. (ACP22.) Accordingly, Ideal and National can not increase demand by reducing prices or aggressively marketing their products. (ACP22.) Increases in sales at one of the competitor's stores -- if not caused by overall market demand -- generally occurs with concomitant decreases in the other's sales. (ACP22.)

The products Ideal and National sell are taxable at 8.25% unless they fall within one of the New York State sales tax exemptions.[1] (ACPP18, 23.) New York State tax law requires businesses to pay the taxes collected and to submit an account of taxable sales in monthly or quarterly returns. (ACP25.) It is alleged that National does not charge cash-paying customers sales tax (on taxable sales) in violation of New York State sales tax laws. (ACPP4, 27.) Defendants do not report or pay to the New York State Department of Taxation and Finance any sales tax on the sales for which Defendants illegally ignore sales tax. (ACPP4, 28.) Since 1998 and continuing to today, National has filed (either by U.S. mail or electronically) fraudulent sales tax returns with the New York State Department of Taxation and Finance. (ACPP5, 29, 44, 47.)The returns misrepresent the amount of taxable sales at National and the amount of sales tax National collects each reporting period. (ACP29.)

Defendants' "cash, no tax" scheme directly injures Ideal because Ideal cannot charge its customers 8.25% more than National and still compete on price, the principal factor in choosing between Ideal and National. (ACPP6, 48.) "National offers customers a substantial savings over Ideal because National does not charge, collect or pay the required sales tax of 8 1/4% on non-exempt cash sales, thereby reducing the total price paid by customers making cash purchases at National, without reducing National's profit margin." (ACPP6, 32, 49.) As a result of Defendants' "cash, no tax" scheme, Ideal has experienced a decrease in taxable cash sales. (ACPP6, 36, 50.) For example, "Ideal experienced a

---

[1] The combined New York State and City sales tax equals 8.25%. See N.Y. Tax Law §§ 1105, 1107, 1109 (McKinney Supp. 2003).

steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate." (ACP35.) The effect of Defendants' "cash, no tax" scheme "is to create an improper competitive advantage for National over Ideal." (ACPP32, 49.)

"By filing, or directing National to file, by U.S. mail New York State sales tax returns that they knew to be fraudulent on a quarterly (or monthly) basis for each reporting period at least since 1998 if not before, defendants Joseph and Vincent Anza on each occasion violated the federal mail fraud statute (18 U.S.C. § 1341). Each violation constitutes a predicate act of racketeering under 18 U.S.C. § 1961(1)(B). To the extent that any of the false returns are filed with the State electronically, defendants also violated 18 U.S.C. § 1343. Each violation of this statute is a predicate act of racketeering."[2] (ACPP45-46; *see* ACP5.) Ideal claims that this "cash, no tax" scheme constitutes a pattern of RICO racketeering, punishable under 18 U.S.C. § 1962(c), (ACPP7, 45-51); that Defendants (re)invest the money from the alleged RICO scheme in National's Bronx location, punishable under 18 U.S.C. § 1962(a), (ACPP55-58); and that the scheme breaches a settlement agreement the parties executed in a 1997 litigation, wherein National and Ideal agreed, among other things, not to interfere with each others'

---

[2] *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985)("Mail fraud qualifies as a racketeering activity under the statute, 18 U.S.C. § 1961(1), and mailing fraudulent state sales tax returns qualifies as mail fraud."); *see also Porcelli v. United States*, 964 F.2d 1306, 1307 (2d Cir. 1992).

"business activities other than through legitimate and proper competition."[3] (ACPP8, 60-67.) **For the reasons set forth below, the Court grants Defendants' motion to dismiss.**

II. Standard of Review

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see McLaughlin v. Anderson*, 962 F.2d 187, 190 (2d Cir. 1992). In resolving a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001); *McLaughlin*, 962 F.2d at 190. In other words, the burden on the movant is very substantial, as the issue before the Court in a Rule 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995)(quoting *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976) (*per curiam*)). While "the well-pleaded material

---

[3] "In 1994, National and other businesses owned and operated by Joseph and Vincent Anza filed a lawsuit against Ideal seeking damages for Ideal's alleged interference with National's customers and employees. *National Security Gates, Inc., et al. v. Vincent Brancato and Sons, Inc., et al.*, New York State Supreme Court, Queens County, Index No. 014536/94." (ACP60.) "That lawsuit was discontinued pursuant to a 'Stipulation of Settlement' dated January 14, 1997." (ACP61.)

allegations of the complaint are taken as admitted... conclusions of law or unwarranted deductions of fact are not admitted." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)(internal quotation omitted). Where, as here, a complaint alleges (mail and/or wire) fraud, the pleading requirements of Fed. R. Civ. P. 9(b) apply. *Id.*; *McLaughlin*, 962 F.2d at 191.

"Civil RICO is an unusually potent weapon--the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim ... has almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996)(citations omitted), *aff'd*, 113 F.3d 1229 (2d Cir. 1997).

III. Analysis

Along with the amended complaint, the Court has reviewed the Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated October 11, 2002 ("Defs. Br."); Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated November 8, 2002 ("Pl. Br."); and the Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), dated November 19, 2002.[4]

---

[4] Oral argument is not needed. *See* Letter from Counsel for Defendant, dated Nov. 19, 2002 ("Both sides have agreed that the parties are content to leave the question of oral argument to the Court.")

The Defendants argue, in support of their motion, that (1) Plaintiff lacks standing to bring a RICO claim because Plaintiff does not allege "proximate cause," Def. Br. at 6 ("National's alleged avoidance of New York State sales tax could only directly affect New York State tax collections, not Ideal's business."); (2) Plaintiff has failed to plead the allegations of mail and wire fraud with particularity as required under Fed. R. Civ. P. 9(b); and (3) the Court must dismiss Plaintiff's supplemental state law claims if the Court dismisses the RICO claims.

Plaintiff responds that proximate cause exists under applicable case law. Plaintiff also argues that the amended complaint, fairly read, alleges fraud with sufficient particularity, and, where it lacks particularity, "the relevant facts are peculiarly within the [Defendants'] knowledge." Pl. Br. at 21-22. Plaintiff concedes that if the Court dismisses the RICO claims "the basis for supplemental jurisdiction is attenuated," but adds that a dismissal of the state-law claims would not be on the merits. Pl. Br. at 25 n.12.

"RICO grants standing to pursue a civil damages remedy to 'any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].' 18 U.S.C. § 1964(c). In order to bring suit under § 1964(c), a plaintiff must plead (1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Commercial Cleaning*, 271 F.3d at 380 (alteration in original). Generally, to satisfy RICO's causation element a complaint must allege that a defendant's violation was both a "but for" or factual cause of plaintiff's injury and the proximate cause, as well. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). In complaints predicated on mail or wire fraud, a plaintiff must plead "'loss causation,'

meaning that the misrepresentation must be both an actual and a proximate source of the loss that the plaintiffs suffered," *Moore v. Painewebber, Inc.*, 189 F.3d 165, 169-70 (2d Cir. 1999), and "transaction causation," which requires a plaintiff to "demonstrate that [plaintiff] relied on defendants' misrepresentations." *Mezzonen, S.A. v. Wright*, 97 CIV. 9380, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5 (S.D.N.Y. Nov. 16, 1999); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings*, 85 F. Supp. 2d 282, 302 (S.D.N.Y. 2000), *aff'd* 00-7356, 242 F.3d 366, 2001 WL 46565 (2d Cir. Jan. 18, 2001); *see also Moore*, 189 F.3d at 171-72; *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995); *Macomber v. Travelers Prop. Cas. Corp.*, 3:98-CV-01060, 1999 U.S. Dist. LEXIS 2707, 1999 WL 118005, at *2 (D. Conn. Jan. 28, 1999). *See generally* Hon. Jed S. Rakoff & Howard W. Goldstein, RICO: Civil & Criminal Law & Strategy, § 1.07[6], at 1-128 (2002)("The Second Circuit ... requires that in the context of predicate acts grounded in fraud the plaintiff must prove both transaction causation and loss causation.").

Ideal has not plead transaction causation. Although Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (ACP30), Ideal has not alleged -- indeed, can not allege -- that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail. *See Odyssey*, 85 F. Supp. 2d at 302 (holding that "to show transaction causation, ... plaintiff must show that it relied on defendant's omission."); *Mezzonen*, 1999 U.S. Dist. LEXIS 17625, 1999 WL 1037866, at *5-*6; *Moore*, 189 F.3d at 169-71. n5

n5 *See also Ficcone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 (holding that plaintiff "failed to plead sufficient facts demonstrating either that he relied on defendants' fraudulent misrepresentations or that such reliance caused him injury"); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 925 F. Supp. 162, 164 (S.D.N.Y. 1996)(denying motion to reconsider holding that "in alleging mail or wire fraud as predicate acts in a civil RICO complaint, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury"); *Miller v. Helmsley*, 745 F. Supp. 932, 940 n.5 (S.D.N.Y. 1990)(siding, in dicta, with cases holding that plaintiff must allege it relied on fraud); *accord Corcoran v. American Plain Corp.*, 886 F.2d 16, 19-20 (2d Cir. 1989); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988). Other courts appear to have held that third-party reliance is sufficient. *See, e.g., Sterling Interiors Group v. Haworth, Inc.*, 94 Civ. 9216, 1996 U.S. Dist. LEXIS 13908, 1996 WL 537482, at *3 (S.D.N.Y. Sept. 23, 1996); *Trautz v. Weisman*, 819 F. Supp. 282, 286 (S.D.N.Y. 1993); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F. Supp. 969, 973 (S.D.N.Y. 1989); *see also Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990).

Plaintiff's reliance on *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001)("*Commercial Cleaning*") to establish causation is not compelling. In *Commercial Cleaning*, reliance was not an issue -- the plaintiff based its RICO complaint upon a violation of the Immigration and Nationality Act, 8 U.S.C. § 1324(a). *Commercial Cleaning*, 271 F.3d at 378, 380 (alleging that defendant "engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act"). Ideal, on the other hand, bases its RICO claim on mail and

wire fraud -- and that is a critical difference. *See Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *5 ("If one alleges predicate acts of mail fraud, as [plaintiff] does, it is necessary to allege that the injured party relied on the fraudulent misrepresentations of the defendant, and that the reliance was the cause of the injury.").

"We must be content with making our best efforts to make recovery commensurate with the statutory wrong and to set out 'our more or less inadequately expressed ideas of what justice demands' in each case." *Sperber v. Boesky*, 849 F.2d 60, 66 (2d Cir. 1988)(quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts 264 (5th ed. 1984)). The Court holds that Plaintiff can not, as a matter of law, allege that it relied on Defendants' alleged misrepresentations to the New York State Department of Taxation and Finance. *See, e.g., Odyssey*, 85 F. Supp. 2d at 302; *see also Moore*, 189 F.3d at 169-70. Consequently, Plaintiff can not satisfy the pleading requirements for its RICO claims. *See Sperber*, 849 F.2d at 60 (dismissing complaint alleging violations of 1962(a) through (d) for failure to plead causation adequately); *Miller*, 745 F. Supp. at 935-40 (same).[5]

Because the Court dismisses Plaintiff's federal (RICO) claims, the Court also dismisses the state law breach of contract claim (without prejudice). *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 130 (2d

---

[5] Because the Court dismisses Plaintiff's RICO claims on causation grounds, the Court need not address Defendants' alternative argument that the pleading fails to comply with the particularity requirements of Fed. R. Civ. P. 9(b). *See Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 116 n.6 (E.D.N.Y. 1993); *Miller*, 745 F. Supp. at 934.

Cir. 2003)("In most circumstances, a district court should decline supplemental jurisdiction if all federal claims have been dismissed at the pleading stage."); *Piccone*, 2000 U.S. Dist. LEXIS 12249, 2000 WL 1219391, at *7 (dismissing state law claims without prejudice to refiling in state court); *see* Pl. Br. at 25 n.12.

IV. Conclusion and Order

For the reasons stated, the Court grants Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court respectfully requests that the Clerk close this case.

Dated: April 1, 2003

/s/ _____
RICHARD M. BERMAN, U.S.D.J.

APPENDIX C

STATUTORY PROVISIONS INVOLVED
18 USC §§ 1961-1968

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USC § 1961 (2004)

§ 1961. Definitions

As used in this chapter [18 USC §§ 1961 et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section

1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice [influencing or injuring officer or juror generally]), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons)[.], section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate

transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 [8 USC § 1324] (relating to bringing in and harboring certain aliens), section 277 [8 USC § 1327] (relating to aiding or assisting certain aliens to enter the United States), or section 278 [8 USC § 1328] (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter [18 USC §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USC §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USC §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USC §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USC §§ 1961 et seq.] either the investigative provisions of this chapter [18 USC §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 USC § 1962 (2004)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 USC § 1963 (2004)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is

sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing

requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of

the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter [18 USC §§ 1961 et seq.], or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter [18 USC §§ 1961 et seq.];

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to--

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter [18 USC §§ 1961 et seq.];

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter [18 USC §§ 1961 et seq.].

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter [18 USC §§ 1961 et seq.] by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any

person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 USC § 1964 (2004)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained

in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USC §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 USC § 1965 (2004)

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter [18 USC §§ 1961 et seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter [18 USC §§ 1961 et seq.] in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial

district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter [18 USC §§ 1961 et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 USC § 1966 (2004)

§ 1966. Expedition of actions

In any civil action instituted under this chapter [18 USC §§ 1961 et seq.] by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 USC § 1967 (2004)

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter [18 USC §§ 1961 et seq.] the proceedings may be open or closed to the

public at the discretion of the court after consideration of the rights of affected persons.

18 USC § 1968 (2004)

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by

a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material

available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter [18 USC §§ 1961 et seq.]. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter [18 USC §§ 1961 et seq.], the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall

return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter [18 USC §§ 1961 et seq.], and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by

the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.